IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-766377-D2
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Marcos COLON

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1964

Marcos COLON

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 7 September 1972, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for two months outright plus four months on 12 months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a Deck Engine Mechanic on board the SS PONCE de LEON under authority of the document above described, on or about 23 February 1972, Appellant did wrongfully engage in mutual combat with a member of the crew, William Meakens.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence testimony of the Third Assistant Engineer, Cristobal Jaquez.

in defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. The Administrative Law Judge then served a written order on Appellant suspending all documents issued to him for a period of two months outright plus four months on 12 months' probation.

The entire decision was served on 18 September 1972. Appeal was timely filed on 16 September 1972.

FINDINGS OF FACT

On 23 February 1972, Appellant was serving as a Deck Engine Mechanic on board the SS PONCE de LEON and acting under authority

of his document while the ship was in the port of New York, New York.

On that date Appellant was relieving Meakens on watch in the engineroom. For no apparent reason Meakens shoved a heavy burner, which he was replacing, at Appellant and then moved toward him uttering profanities. Appellant moved to meet Meakens and blow were exchanged simultaneously. The Third Assistant Engineer attempted to separate them, but was unable to do so. The men were finally separated by several crewmembers. Appellant then went to the machine shop, obtained a brass rod and returned, however, the rod was taken from him before he could reach Meakens. Both men were severely injured. Appellant sustained a broken nose, partial amputation of his right ear, and a three inch cut on his leg. Meakens suffered a concussion and broken ribs.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

(1) it was error for the Administrative Law Judge to deny the motion to dismiss, when the government rested its case, on the ground that the government had failed to make out a prima facie case;

(2) the decision and order are contrary to the evidence; and

(3) the order of suspension is excessive under the circumstances.

APPEARANCE: Abraham E. Freedman, for Appellant.

OPINION

I

While it is true that failure to prove mutual willingness to engage in combat will negate a charge of mutual combat, the proof of mutual willingness can be inferred from the actions of the parties and need not be proven by direct testimony of an eyewitness that there was an actual mutual agreement to engage in a fight. Here there was sufficient evidence on the record based on the testimony of the Third Assistant Engineer, that he was unable to keep the two men from attacking each other when he tried to separate them and that after they had been separated Appellant obtained a brass rod and attempted to re-engage Meakens, to allow the Administrative Law Judge to infer mutual willingness and deny the motion to dismiss.The later testimony of both Meakens and the

Appellant further substantiated this inference of mutual willingness.

II

It is the function of the Administrative Law Judge to hear the evidence, determine the credibility of the witnesses, and decide the weight to be given to the evidence. There is no impropriety in his acceptance of only part of the evidence of any witness and rejection of the remainder. While Appellant stated that Meakens made the first move, he also testified that he willingly moved to meet him before any blows had been struck. He further acknowledged that, when there was an attempt to separate them, he refused to stay separated and moved to re-engage Meakens. This evidence is certainly adequate to support the Administrative Law Judge's findings.

III

In view of the serious nature of the injuries sustained by both men and their determination to engage each other, there can be no compelling argument that the order is too severe; if anything, it is lenient. The fact that the period of suspension awarded Appellant is less than that awarded Meakens is indicative of only that the Administrative Law Judge, in considering the entire record and Appellant's prior record felt that Appellant was entitled to a more lenient order. A finding of mutual combat can be sustained even where the parties are not of equal fault.

The fact that Appellant has already surrendered his document for a period in excess of two months has no bearing, since the surrender was for medical reasons and not as a result of the Administrative Law Judge's order.

ORDER

The order of the Administrative Law Judge dated at New York, New York on 7 September 1972, is AFFIRMED.

T.R. SARGENT
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 29th day of June 1973.

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